

SERVED: June 17, 1992

NTSB Order No. EA-3588

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 26th day of May, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

v.

Docket SE-10463

JAMES FRANK WILLIAMS,

Respondent.

OPINION AND ORDER

Both the Administrator and respondent (appearing pro se) have appealed from the oral initial decision of Administrative Law Judge William R. Mullins issued on January 30, 1990, following an evidentiary hearing.¹ We grant the Administrator's appeal, and deny that of respondent.

The Administrator's order of suspension (complaint) charged respondent with violations of § § 135.213(a), 213(b), and 215(a), and § 91.9 of the Federal Aviation Regulations ("FAR," 14 C.F.R.

¹The initial decision, an excerpt from the hearing transcript, is attached.

Parts 135 and 91).² The Administrator imposed a sanction of 45 days suspension of respondent's airline transport pilot certificate. The law judge affirmed only that part of the complaint alleging a § 91.9 violation, and reduced the sanction to a 30-day suspension.

Respondent and the Administrator stipulated to the basic facts, as set forth in various paragraphs of the complaint viz.:

2. On or about January 27, 1989 you, as pilot-in-command, operated civil aircraft N4737P, a Cessna Model P210N, on an IFR cargo-carrying flight, being operated by Kangaroo Transportation, Inc., subject to the requirements of Part 135 of the Federal Aviation Regulations, originating at Animas Airpark, Durango, CO.

3. The foregoing flight terminated in an accident during your takeoff attempt at Animas Airpark.

4. Animas AirPark is located outside of controlled airspace.

5. A standard instrument approach procedure was not approved for Animas Airpark on the date of your flight.

6. There was no U.S. National Weather Service or other approved source of weather data located at Animas AirPark on the date of your flight.

In many respects, the complaint is identical to that recently addressed in Administrator v. Toups, NTSB Order EA-3584 (1992). Here, as well, the complaint charged respondent with violating: 1) subsection 213(a), in failing to use a prescribed weather source in a Part 135 cargo-carrying operation, when such an operation required the use of a weather report or forecast; 2)

²These, as well as other relevant provisions, are reproduced in the appendix.

subsection 213(b), in conducting an instrument flight rules ("IFR") operation, but failing to use weather observations taken at the relevant airport; and 3) subsection 215(a), in conducting an IFR operation either outside of controlled airspace or at an airport that did not have an approved standard instrument procedure. In contrast to Toups, however, the section 91.9 violation here (of carelessness, as opposed to recklessness) was premised on the takeoff accident.

Not only had respondent stipulated to the facts set forth above, but at the hearing he admitted the section 135 violations. Tr. at p. 109.³ Nevertheless, the law judge found that the section 213(a) and (b) and section 215(a) claims had not been established by a preponderance of the evidence. Tr. at p. 120. Citing the Lindstam doctrine, the law judge found the accident to be the result of respondent's "carelessness, inattention, or negligence ." Tr. at p. 117.⁴

Respondent appeals that conclusion and the resulting sanction. The Administrator appeals the law judge's failure to

³Respondent explained that his understanding of the rules had been that they only prohibited departure in IFR conditions. Tr. at p. 81-83.

⁴Administrator v. Lindstam, 41 C.A.B. 841 (1964). Under this doctrine, the Administrator need not allege or prove specific acts of carelessness to support a violation of section 91.9. Instead, using circumstantial evidence, he may establish a prima facie case by creating a reasonable inference that the incident would not have occurred but for carelessness on respondent's part. The burden then shifts to respondent to come forward with an alternative explanation for the event sufficient to cast reasonable doubt on (that is, overcome the inference of) the Administrator's claim of carelessness.

find violations of sections 213(b) and 215(a).⁵

Even were we to ignore respondent's admission at the hearing, the stipulations, as well as other hearing testimony, establish the Part 135 violations. Our decision in Toups, supra, analyzed these two sections in some detail. In short, subsections (a) and (b) of section 213 are not redundant or poorly drafted, as found by the law judge, Tr. at p. 116. Because subsection (b) requires that authorized weather observations be available at the airport at which-IFR operations are being conducted, IFR operations may not be conducted at airports without this capability. Respondent has stipulated that this was a Part 135 operation, and that Animas Airpark had no U.S. National Weather Service or other approved source of weather data at the time. The record also contains unrebutted testimony that the IFR clearance was given prior to departure. Tr. at p. 20.⁶ Nothing else is required to find a violation of the subsection. Accordingly, we reverse the initial decision and grant the Administrator's appeal on this point.

The law judge offered no reasons why he dismissed the section 135.215(a) charge. He does not discuss the item in the initial decision or elsewhere in the transcript. We find, however, that the Administrator met, his burden of proving that

⁵The Administrator has not appealed the dismissal of the section 213(a) claim, or the law judge's 15-day reduction in the suspension period.

⁶Independent testimony confirms these and other § 213 and § 215 requirements. See, ea., Tr. at pps. 20-22.

violation (again, even without respondent's admission).

Respondent admitted that Animas AirPark is in uncontrolled airspace and has no approved standard instrument approach procedure. Both admissions are confirmed in the testimony of other witnesses. See note 6, supra. As discussed in Toups, absent an FAA authorization contained in the company's operating specifications, section 215(a) therefore prohibits IFR operations there. A witness for the Administrator offered unrebutted testimony to the lack of any such authorization. Tr. at p. 17. Thus, we are compelled to find a violation of section 215(a) as well.⁷

We turn now to respondent's appeal. Respondent contends that his actions prior to the accident -- actions he considers reflect the highest degree of care -- were not adequately considered by the law judge. However, our review of the transcript leads us to disagree. Moreover, we do not share respondent's conclusion that the law judge's questions and comments compromised respondent's ability to testify coherently, and we see no error in the law judge's ultimate finding. Regardless of respondent's preflight actions or his assessment as to the prudence of them, the fact remains that the accident occurred and it was the law judge's obligation to determine

⁷Also as we noted in Toups, had respondent taken off VFR and obtained the IFR clearance in flight rather than before takeoff, he would not have violated the cited regulations. Respondent testified that the former was the normal procedure, except when the weather was questionable. This was only the second time he had not obtained the IFR clearance after takeoff. Tr. at p. 81.

whether it was caused by respondent's carelessness.

In answering this question, the law judge had before him testimony of FAA witnesses who were involved in the accident investigation. They believed the accident was caused by respondent's loss of visual reference and his resulting takeoff roll at an angle off the runway. They suggested (contrary to respondent's testimony) that the runway lights would not have been visible and that the amount of snow falling in the area made takeoff a reckless act. Tr. at pps. 23-24, 28, 63, 67. Also in the record were two different explanations offered by respondent, one at the time of the accident, and the other at the hearing.⁸

Applying Lindstam, the law judge implicitly found that respondent's explanation was not a reasonable alternative. We cannot find that the judge's conclusion is unsupported in the record or unreasonable.⁹

⁸In the report respondent completed after the accident (Exh. 17), he indicated its cause: "As the main gear started off the runway, the right main went into the deep snow on the right side of the runway. This pulled the airplane back to the ground + off the right side of the runway." See also Tr. at p. 98.

At the hearing, he stated: "just as I'm lifting off, the wheels are breaking ground, the airplane, the right wheel, touched back down and breaking free from the ground and the little bit of acceleration there and then hitting that snow again, caused a deceleration and with the right wheel, it pulled me to the right, which sent me on my course into the ditch." Tr. at pps. 81-81.

⁹Even if Lindstam did not apply, the law judge's finding is not susceptible of reversal. The law judge chose between conflicting testimony, and made credibility assessments based on his personal examination of each witness. We cannot find his choice favoring the Administrator unsupported in the record or otherwise arbitrary or capricious.

Finally, respondent has noted with regard to the sanction imposed, that his certificate is the only means of support for his family. Case law establishes, however, that this is not a criterion we may consider. Administrator v. Mohamed, NTSB EA-2834 (1988) at p. 11.¹⁰

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;
2. Respondent's appeal is denied;
3. The initial decision is modified as discussed in this decision; and
4. The 30-day suspension of respondent's airline transport pilot certificate shall begin" 30 days from the date of service of this order.¹¹

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

¹⁰We also note that neither a violation-free record or good attitude has been found to justify reduction of a sanction. Administrator v. Thompson, NTSB Order EA-3247 (1991), fn. 9.

¹¹For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).

APPENDIX

§ 91.9 (now 91.13) provided:

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

§ § 135.213(a) and (b) provided:

§ 135.213 Weather reports and forecasts.

(a) Whenever a person operating an aircraft under this part is required to use a weather report or forecast, that person shall use that of the U.S. National Weather Service, a source approved by the U.S. National Weather Service, or a source approved by the Administrator. However, for operations under VFR, the pilot in command may, if such a report is not available, use weather information based on that pilot's own observations or on those of other persons competent to supply appropriate observations.

(b) For the purposes of paragraph (a) of this section, weather observations made and furnished to pilots to conduct IFR operations at an airport must be taken at the airport where those IFR operations are conducted, unless the Administrator issues operations specifications allowing the use of weather observations taken at a location not at the airport where the IFR operations are conducted. The Administrator' issues such operations specifications when, after investigation by the U.S. National Weather Service and the FAA Flight Standards District Office charged with the overall inspection of the certificate holder, it is found that the standards of safety for that operation would allow the deviation from this paragraph for a particular operation for which an ATCO operating certificate has been issued.

§ 135.215 provided:

§ 135.215 IFR: Operating limitations.

(a) Except as provided in paragraphs (b), (c) and (d) of this section, no person may operate an aircraft under IFR outside of controlled airspace or at any airport that does not have an approved standard instrument approach procedure.

(b) The Administrator may issue operations specifications to the certificate holder to allow it to operate under IFR over routes outside controlled airspace if -

(1) The certificate holder shows the Administrator that the flight crew is able to navigate, without visual reference to the ground, over an intended track without deviating more than 5 degrees or 5 miles, whichever is less, from that track; and

(2) The Administrator determines that the proposed operations can be conducted safely.

(c) A person may operate an aircraft under IFR outside of controlled airspace if the certificate holder has been approved for the operations and that operations is necessary to -

(1) Conduct an instrument approach to an airport for which there is in use a current approved standard or special instrument approach procedure; or

(2) Climb into controlled airspace during an approved missed approach procedure; or

(3) Make an IFR departure from an airport having an approved instrument approach procedure.

(d) The Administrator may issue operations specifications to the certificate holder to allow it to depart an airport that does not have an approved standard instrument approach procedure when the Administrator determines that it is necessary to make an IFR departure from that airport and that the proposed operations can be conducted safely. The approval to operate at that airport does not include an approval to make an IFR approach to that airport.